that he did not notice the respondent's presence until after the accident. He said:

"The tractor slowed down and I walked towards its rear. When tractor stopped I had reached its rear and I immediately lifted the cover of the cultivator to loosen the chain so as to lower the cover. As I was lifting the cover with my right hand and loosening the chain with my left hand I noticed the plaintiff was falling down to the ground to my right with his feet under the cover. I did not see him come there."

As for the tractor driver he too did not notice the respondent until after the accident. On the evidence, such as it was, the learned trial judge recorded his finding in these words:

"I find the driver negligent. I also find contributory negligence on part of plaintiff. I apportion liability on 50-50 basis. I assess the quantum at $7,000 on basis of full liability. In the event I give judgment for plaintiff in the sum of $3,500 and costs."

He made this finding on May 24, 1972. But in a written judgment dated July 16, 1972 he said, *inter alia:*

"As the rotating blade was some sort of unusual or even concealed danger of which DW.2 knew or ought to have known I found that defendant was liable for injuries sustained by the plaintiff as an invitee or even as a licensee. I was satisfied that negligence under paragraph (f) of the particulars of negligence had been established."

Paragraph (f) is in these terms:

"Causing or permitting the plaintiff to stand near the tractor in order to pull the tractor chain, when the tractor was in motion or operation when the defendant or his servant or agent knew or ought to have known it was unsafe and dangerous for defendant so to do."

Since neither Abdullah nor the tractor driver, Mohamed Said, had seen the respondent before the accident we fail to see how the paragraph can be said to have been established. At any rate the question is what is the real basis of the trial court's decision? Was it negligence or was it a breach of an occupier's duty to an invitee or a licensee? Without trying to answer this question, we shall proceed to consider whether on the facts either head of tortious liability has been established.

As for negligence there was not an iota of evidence to support a finding that the tractor driver was guilty of a breach of duty to exercise care. There is no doubt that the respondent had gone to assist Abdullah with the best of intentions. That, however, is beside the point. To succeed in his claim for damages he must prove negligence and this he failed to do.

As for breach of an occupier's duty to an invitee, the law is well stated in the judgment of Willes J. in *Indermaur* v. *Dames.*[1] While we have no quarrel with the trial judge's view that the respondent was an invitee we have some doubt whether at the material time the appellant was the occupier of the land. The owner of the land was Mustapha bin Deraman and the appellant was there as an independant contractor. However, this is not of great importance as the respondent was not injured as a result of any dangerous condition of the land. He was injured by the tractor's blade. The word "occupier" has been used in cases dealing with this principle of liability to describe a person who retains control over land, structures or premises. A person who lawfully enters upon such land, structures or premises is either an invitee or a licensee. In the instant case even assuming that the tractor was a structure it would be a misuse of the English language to say that on the facts the respondent had entered upon it. There may possibly be some other principle of liability which can govern the respondent's case but we are clearly of the view that the rule in *Indermaur* v. *Dames, supra,* cannot apply to this case.

We would allow this appeal with costs.

Appeal allowed.

Solicitors: *Wrigglesworth & Co.; Wan Mustapha & Co.*

TAN SWEE LAN v. ENGKU NIK BINTI ENGKU MUDA & ORS.

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) August 10, 1973]

[Kuala Trengganu — Federal Court Civil Appeal No. 16 of 1973]

Limitation — Action for specific performance of agreement for sale of land — Accrual of cause of action — When period of limitation begins to run — Whether material that claimant is not in possession of land — Limitation Ordinance, 1953, s. 9(1).

The appellant had claimed specific performance of an agreement for the sale of land. The agreement was made on April 12, 1958 and on March 2, 1970 the appellant wrote to the defendants claiming performance of the agreement. On March 16, 1970 the respondents replied that they were not taking steps to effect the transfer and they challenged the validity of the agreement. The writ was issued on April 16, 1970. The learned trial judge held that the action was statute barred. As the appellant was not in possession of the land he held that time ran from the date of the agreement.

Held: the period of limitation in this case ran from the date that the respondents threatened to infringe the appellant's right by saying that they refused to effect the transfer of the land. It was immaterial that the appellants were not in possession of the land. The defence of limitation failed and the appeal must be allowed.

Cases referred to:-

(1) *Bolo* v. *Kokland & Ors.* L.R. 57 I.A. 325; A.I.R. 1930 P.C. 270.

(2) *Ng Moh* v. *Tan Bok Kim & Anor.* [1969] 1 M.L.J. 46.

(3) *Nasri* v. *Mesah* [1971] 1 M.L.J. 32.

(4) *Halijah* v. *Morad & Ors.* [1972] 2 M.L.J. 166.

(5) *Williams* v. *Greatex* [1957] 1 W.L.R. 31.

FEDERAL COURT.

Lee Leng Guan for the appellant.

Dato Bijaya for the respondents.

Ali F.J. (reading the judgment of the court): We allowed this appeal on the date of hearing and, as indicated, we now give our reasons.

By a written agreement dated April 12, 1958, the respondents agreed to sell and the appellant agreed to buy a piece of land held under Grant 2483, Lot 2451 in the township of Kuala Trengganu. The agreed price was $3,600 of which $750 was paid by the appellant as down payment. The balance was to be paid when the land was transferred to the appellant. On the date of the agreement the land was part of the estate of the late Engku Muda bin Engku Besar and all the respondents were said to be beneficiaries of the estate.

On March 2, 1970, the appellant through his solicitor, wrote to the respondents reminding them of the

agreement and pointing out that they have failed to take steps to have the land transferred. He threatened legal proceedings if the land was not transferred within seven days. The respondents also through their solicitors replied on March 16, 1970 saying that they were unable to comply with the appellant's request and that they were not taking any steps to effect the transfer. They also challenged the validity of the agreement. A month later on April 16, 1970, the appellant issued the writ in this action claiming specific performance or alternatively, for damages for breach of contract. In their statement of defence which was later amended the respondents raised the defence of fraud and limitation. They failed on fraud but succeeded on limitation.

On the defence of limitation the question which arose was whether the period of 12 years ran from the date of the agreement, *i.e.* April 12, 1958, as contended by the respondents, or, as contended by the appellant, from the date when the respondents threatened to infringe his right by saying in their letter of March 16, 1970 that they refused to take any steps to effect the transfer of the land. Section 9(1) of the Limitation Ordinance, 1953 which governs this question is in these terms:

"9. (1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person."

In the Privy Council case of *Bolo* v. *Kokland & Ors*[1] it was stated:

"There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted."

This particular passage has influenced the decision of the Federal Court in *Ng Moh* v. *Tan Bok Kim & Anor*[2] which was later followed in *Nasri* v. *Mesah*.[3] On these authorities the appellant's contention would seem to be correct. But the learned judge held otherwise. He distinguished those cases on the ground that the appellant in the instant case was not in possession of the land. Apparently he was of the view that possession or no possession was relevant to the consideration of the issue before him. The case of *Halijah* v. *Morad & Ors.*,[4] also a Federal Court decision, was referred to as though it was an exception to the rule established in *Bolo* v. *Kokland & Ors., supra,* and followed in *Ng Moh* v. *Tan Bok Kim & Anor., supra,* and *Nasri* v. *Mesah, supra.* We must say at once it was not such an exception. In *Halijah* v. *Morad & Ors., supra,* four beneficiaries of an estate sued Halijah to recover possession of a piece of land in Kedah. Halijah counter-claimed for the transfer of the land or for specific performance of a contract admittedly signed by the beneficiaries and their deceased mother to whom the land belonged. In dealing with *Halijah's* counter-claim the trial court held on the fact that the contract was void as against two of the beneficiaries because at the time of the agreement they were minors or infants. So the counter-claim against them failed. As regards the other two beneficiaries, they raised the statutory defence of limitation under the Kedah Enactment which was applicable. Being out of time by about 8 years the trial court held the counter-claim statute barred. No question arose as to the date from which the period of limitation was to run. Halijah appealed to the Federal Court and there too the said question did not arise for consideration. But her counsel found it necessary to rely on the judgment of Lord Denning in *Williams* v. *Greatex*.[5] In that case the purchaser of land who was in possession brought an action for specific performance after having waited for 10 years. The vendor resisted the claim on the ground that "there had been too much delay to enable the purchaser to obtain specific performance." Lord Denning in his judgment said that 10 years is a long time to wait before bringing an action for specific performance. But then on the facts before him he held that the purchaser had more than an equity. He had an equitable interest in the land and that so long as he was in possession he did not lose his rights simply by not proceeding at once for specific performance. Lord Denning was undoubtedly considering whether the equitable maxim, delay defeats equity, should operate against the purchaser. He was not concerned with the statutory defence of limitation. In the judgment of the Federal Court in *Halijah* v. *Morad & Ors., supra,* it was pointed out that inasmuch as Halijah was in possession not as a purchaser but as a creditor, the principle stated by Lord Denning did not apply. That was in answer to the counsel's reliance on the said principle. Nothing which was said can, however, be taken as suggesting that possession or no possession is a factor for determining the date from which the period of limitation is to run. *Halijah* v. *Morad & Ors., supra,* therefore, is not an authority for such a proposition.

These were our reasons for allowing this appeal.

Appeal allowed.

Solicitors: *Lee & Co.; Datuk Bijaya & Co.*

LEE CHUAN TUAN v. COMMISSIONER OF LANDS AND MINES, JOHOR BAHRU

[O.C.J. (Syed Othman J.) August 28, 1973]
[Johor Bahru — Originating Summons No. 81 of 1972]

Land Law — Whether lessee of land a registered proprietor — Whether lease gives power to lessee to apply to Commissioner of Lands and Mines for subdivision of the land — National Land Code, ss. 5, 135, 136, 221 and 227.

In this case the registered proprietors had leased a piece of land to the applicant for 75 years. Under the terms of the lease the lessee was to develop the land by building houses on it and for that purpose he was to be at liberty to subdivide the land. The applicant applied to the Land Office for subdivision of the land. This application was refused. The Originating Summons in this case raised the following questions—

(1) Whether a lessee in the circumstances of this case is a registered proprietor within the meaning of the National Land Code;

(2) If he is not, whether the lease gives power to the lessee to apply to the Commissioner of Lands and Mines for subdivision of the leased land.

Held: (1) the lessee is not the registered proprietor within the meaning of the National Land Code;

(2) the lease did not give the lessee the power which enables the Commissioner of Lands and Mines as the approv-